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No. 89-1261

In the Supreme Court of the United States

OCTOBER TERM, 1989

SPENCER I. JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS W. OSBORNE
Cmdr., JAGC, USN
WILLIAM R. SPRANCE
Lt., JAGC, USNR
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

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QUESTION PRESENTED

Whether *Miranda* v. *Arizona*, 384 U.S. 436 (1966), prohibits the police from questioning a suspect who is represented by counsel in the absence of a request by the suspect to speak with his lawyer or to have him present during questioning.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-30a) is reported at 29 M.J. 177. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 31a-42a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1989. The petition for a writ of certiorari was filed on February 6, 1990. The petition is therefore out of time under former Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial, petitioner, a member of the United States Navy, was convicted of unpremeditated murder, felony murder, conspiracy to commit robbery, and robbery, in violation of Articles 118, 81, and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 881, and 922. The court-martial sentenced petitioner to confinement for life, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review dismissed the unpremeditated murder specification, but otherwise affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. The background of this case is discussed in detail in the lead opinion of the Court of Military Appeals. Pet. App. 2a-13a. On February 2, 1985, petitioner and Seaman Thomas Hardnett, Jr., persuaded petitioner's roommate, Petty Officer Gregory Swafford, to drive them from the Norfolk Naval Air Station to the city of Norfolk, Virginia. GX 24, at 1. Hardnett had previously told petitioner that he intended to rob Swafford once they reached their destination. In Norfolk, Hardnett instigated an argument with Swafford, which resulted in a physical struggle. *Id.* at 2. During the struggle, petitioner restrained Swafford while Hardnett killed him. Petitioner then stole Swafford's wallet. *Id.* at 3. Swafford's body was loaded into the trunk of his car, driven to a nearby creek, and dumped into the water. *Ibid.* When Swafford did not return to the base, petitioner and Hardnett said that they last saw Swafford when they dropped him off in town. Pet. App. 2a.

The Navy began an investigation that lasted for several months. Along with dozens of other sailors, petitioner was interviewed concerning Swafford's disappearence. Petitioner

gave his initial statement to a Naval Investigative Service (NIS) agent on February 8, 1985. GX 4. Petitioner was not a suspect at that time. On April 3, Swafford's body was discovered after it surfaced in a creek in Chesapeake, Virginia. Tr. 266. Because a camera strap was tied around Swafford's neck, foul play was suspected. Since petitioner and Hardnett were the last persons to see Swafford alive, they were interviewed again by civilian and military authorities. Hardnett was questioned in Norfolk, while petitioner was questioned in Gaeta, Italy, where his ship was deployed. Petitioner's account of events on the night Swafford disappeared differed in several respects from the version Hardnett gave. Petitioner nonetheless clung to the story that he and Swafford had concocted. Pet. App. 2a-4a.

On July 22, a letter written by Hardnett was seized during a consent search of petitioner's shipboard locker. The letter explained that Hardnett had spoken to the authorities, and it instructed petitioner to conform his version of events to Hardnett's. GX 7B. After advising petitioner of his rights, an NIS agent confronted petitioner with Hardnett's letter. Petitioner then began to change his story. Petitioner said that Hardnett killed Swafford after Swafford made a homosexual advance to Hardnett. Petitioner, however, continued to deny that he ever touched Swafford. Petitioner was flown back to Norfolk on July 26. In further discussions with Navy authorities, petitioner said that he tried to break up the fight between Swafford and Hardnett, but that Hardnett pushed petitioner into Swafford in a way that pressed petitioner's forearm across Swafford's throat. Petitioner was then ordered into pretrial confinement. On July 30, a Navy attorney, Lieutenant Stephen Stallings, was notified that he would represent petitioner. Tr. 125. On July 31, petitioner met with Lieutenant Stallings for about two hours at the Norfolk Naval Station Brig. Tr. 126; Pet. App. 5a-8a.

After Lieutenant Stallings left the brig, the military authorities relinquished custody of petitioner to a Chesapeake police detective who was waiting at the brig. Petitioner was taken to police headquarters, where he was given *Miranda* warnings. Tr. 77. Petitioner waived his rights and agreed to speak to the police without counsel present. Tr. 78; GX 24, at 1. Petitioner subsequently admitted the truth about Swafford's death. After the interview was tape-recorded and transcribed, petitioner swore under oath that it was true. Petitioner then led the Chesapeake police to the alleyway in Norfolk where Swafford was killed. After learning that the murder was committed in Norfolk, the Chesapeake police relinquished custody of petitioner to the Norfolk police. Petitioner was again advised of his *Miranda* rights by the Norfolk police, and he waived those rights. On August 3, petitioner made another statement that was consistent with his July 31 statement. The local authorities in Virginia ultimately decided to return petitioner to the military for prosecution, and petitioner was court-martialed for the crimes. Pet. App. 8a-13a.

2. At trial, petitioner moved to suppress both his July 31 and August 3 statements on the ground that they were taken in violation of Mil. R. Evid. 305 and the Sixth Amendment. AX 1, at 5-7. Petitioner also claimed that his August 3 statement was obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), because he had asked to speak with a lawyer after giving a statement to the police, but before signing it, and he was not given an opportunity to do so. AX 1, at 7-8.

Following a hearing, the trial court denied the motion. The court held that petitioner had been properly advised of his *Miranda* rights and had validly waived those rights before he was questioned on July 31 and August 3. Tr. 168-169. The court also held that petitioner did not ask to speak with a lawyer before signing his August 3 statement

and that, even if he had done so, his request would have required the suppression of only his signature, not the entire statement. Tr. 169; Pet. App. 11a-12a.

3. The court of military review affirmed. Pet. App. 31a-42a. The court found that there was no evidence to suggest that petitioner made any request for counsel until after the August 3 interview. *Id.* at 39a.

4. The Court of Military Appeals affirmed by a divided vote. Pet. App. 1a-30a. Judge Cox rejected petitioner's claim that his July 31 and August 3 statements were obtained in violation of Mil. R. Evid. 305 and the Sixth Amendment. Pet. App. 16a-21a. Judge Cox also concluded that the admission of petitioner's July 31 and August 3 statements did not violate the principles of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), for two reasons: (1) petitioner did not raise that claim at trial or on appeal, and (2) petitioner did not communicate to the military or civilian authorities that he wished to consult with an attorney before questioning. Pet. App. 21a-24a. Judge Sullivan concurred in the result on the ground that petitioner's July 31 and August 3 statements "were voluntary and were preceded by appropriate waivers of counsel." *Id.* at 24a.

Chief Judge Everett dissented. Pet. App. 25a-30a. He assumed that petitioner had asked to speak with a lawyer while he was in custody because Rule for Courts-Martial 305(f), *Manual for Courts-Martial, United States – 1984* (*Manual*), requires that counsel be appointed for a servicemember if he so requests. Pet. App. 25a-27a. Judge Everett added that, in his view, the Navy's assignment of Lieutenant Stallings to petitioner and petitioner's acceptance of Stallings' services "constituted the 'functional equivalent' of the request for counsel" required by *Edwards* and *Arizona* v. *Roberson*, 486 U.S. 675 (1988). Pet. App. 29a.

ARGUMENT

Petitioner claims that the trial court erred in admitting into evidence his July 31 statement to the Chesapeake, Virginia, police. Relying on *Edwards* v. *Arizona*, *supra*, petitioner argues that he in effect indicated a desire to speak to the police only through counsel once Lieutenant Stallings was appointed to be his lawyer. That claim does not warrant review by this Court, for several reasons.

1. Petitioner has not properly preserved his claim. He did not object before or at trial to the introduction of his July 31 statement on the ground that it was obtained from him in violation of *Edwards*. Instead, he claimed only that the statement was inadmissible under military law and the Sixth Amendment. See AX 1 (defense suppression motion). Petitioner has therefore waived his claim. Mil. R. Evid. 103.[1] In addition, petitioner did not argue on appeal in either the court of military review or the Court of Military Appeals that the admission of his July 31 statement violated *Edwards*. Nor did petitioner invoke *Edwards* in support of the claim that the July 31 statement should not have been admitted. Instead, petitioner argued that his July 31 statement was inadmissible under military law and the Sixth Amendment, and that the military appellate courts should exclude that statement under their supervisory power. See Appellant's Br. 24-31 (N.-M.C.M.R. filed Oct. 10, 1986); Supp. to Pet. for Grant of Review 5-8 (C.M.A. filed Nov. 25, 1987); Appellant's Br. 6-28 (C.M.A. filed May 31, 1988).

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[1] Mil. R. Evid. 103 requires a "timely objection" to preserve error for appeal, absent plain error. Under military law, "[p]lain error is not the equivalent of obvious error. Rather, . . . 'plain error is only found in exceptional circumstances where the reviewing court finds that reversal is necessary to preserve the integrity and reputation of the judicial process, or to prevent a miscarriage of justice.' " *United States* v. *Webel*, 16 M.J. 64, 66 (C.M.A. 1983).

Judge Cox therefore correctly found that petitioner did not raise at any stage of the proceedings the claim that he had been interrogated in violation of *Edwards*.[2] Under these circumstances, petitioner has waived the claim presented in the petition. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).

2. In any event, petitioner's claim lacks merit. Petitioner claims that he asked to speak with counsel before he was questioned on July 31. Pet. 7. There is no indication in the record, however, that petitioner ever requested an attorney; the court of military review, which has appellate factfinding authority under Art. 66 of the UCMJ, 10 U.S.C. 866, found that petitioner made no such request, Pet. App. 39a, and in the lead opinion for the Court of Military Appeals Judge Cox found that petitioner never invoked his right to counsel under *Edwards*, Pet. App. 23a-24a. That finding does not warrant review by this Court.

Petitioner relies on the dissenting opinion of Chief Judge Everett. The dissent, however, did not find that petitioner had asked to speak with a lawyer. Instead, the dissent *assumed* that petitioner must have done so, since Rule 305(f), *Manual*, requires that an attorney be appointed for a servicemember who requests one and since an attorney was appointed to represent petitioner while he was in custody. Pet. App. 25a-27a. That assumption, however, is in error. In the military, counsel may be, and often is,

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[2] As Judge Cox explained: "[Petitioner] never claimed to have invoked a right to counsel: Trial defense counsel did not claim that he did; and even appellate defense counsel have not so contended. Until now, no one has suggested that [petitioner] ever sought to convey to anyone a desire to communicate with the police only through the medium of counsel. This case was litigated on a constitutional level as a Sixth Amendment matter all along, not as a Fifth Amendment one. Never was it alleged that the authorities failed to scrupulously honor [petitioner's] wishes with respect to counsel." Pet. App. 23a.

appointed for a servicemember in custody based on fact of custody alone, regardless of whether the servicemember has asked to speak with an attorney. Accordingly, there is no support for petitioner's claim that he asked to speak with a lawyer before being questioned on July 31.

Petitioner is also wrong in his contention that this Court's decision in *Edwards* prohibits the police from questioning a suspect in custody who is represented by an attorney in the absence of his counsel. *Edwards* held that a suspect, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities *until counsel has been made available to him*, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485 (emphasis added). Once counsel has been provided, *Edwards* imposes no further bar to police interrogation as long as the suspect validly waives his *Miranda* rights. *Edwards* does not require that any such waiver be made only in the presence of the lawyer.

Petitioner does not claim that he was not properly given *Miranda* warnings before he was questioned on July 31, nor does he claim that he did not validly waive his rights under *Miranda*. Since the claim that petitioner does raise lacks merit, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

THOMAS W. OSBORNE
Cmdr., JAGC, USN

WILLIAM R. SPRANCE
Lt., JAGC, USNR
Appellate Government Counsel
Appellate Government Division, NAMARA

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